

121.

sfw

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

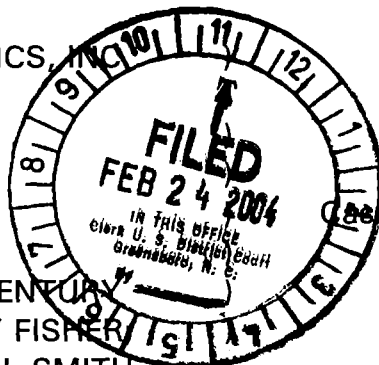
INTERSTATE NARROW FABRICS, INC.

Plaintiff,

v.

CENTURY USA, INC., d/b/a CENTURY
NARROW FABRICS; MURRAY FISHER
JOHN I. WILD; and GEORGE H. SMITH,

Defendants.



Case No. 1:02CV00146

MEMORANDUM OPINION

TILLEY, Chief Judge

This matter is now before the Court on Plaintiff Interstate's Renewed Motion to Compel Production of Defendant Fisher's Tax Returns [Doc. #111]. For the reasons set forth below, Plaintiff's Motion to Compel will be GRANTED.

I.

On August 22, 2003, Interstate Narrow Fabrics, Inc. ("Interstate") originally moved to compel production of Defendant Murray Fisher's tax returns on the grounds that the financial information reported was relevant to the punitive damages claims against Mr. Fisher. [Doc. #85]. On September 22, 2003, United States Magistrate Judge Wallace Dixon denied Interstate's Motion to Compel, because, at the time, there had been "no credible showing" that Plaintiff was entitled to punitive damages on the claims alleged against Defendant Fisher. [Doc. #103]. However, the Order stated, "if the punitive damages claim survives

summary judgment, the motion for production of Fisher's tax returns may be renewed."

On October 2, 2003, this Court denied the Defendants' Motion for Summary Judgment as to Interstate's punitive damages claims against Century USA, Inc. ("Century") and Mr. Fisher. [Doc. #107]. Because the punitive damages claims against Mr. Fisher survived summary judgment, Interstate has now renewed its Motion to Compel, pursuant to the Magistrate Judge's September 22, 2003 Order. Specifically, this Motion requests that Mr. Fisher produce, within 20 days, his state and federal tax returns from 1998 through the present. Along with the Motion, Interstate filed a Certificate of Attorney Conference Pursuant to Local Rule 26.1(c) stating that all meet and confer requirements have been met. [Doc. #113].

II.

Federal Rule of Civil Procedure 26(b)(1) provides the general rule governing pre-trial discovery: "Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, . . . Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." The Fourth Circuit has not developed a clear rule as to the discoverability of income tax returns in particular. However, the general federal rule is that disclosure of tax returns is disfavored. E. Auto Distribs., Inc. v. Peugeot Motors of Am., Inc., 96 F.R.D. 147, 148-49 (E.D. Va. 1982) ("a 'qualified' privilege emerges from the case law that

disfavors the disclosure of income tax returns as a matter of general federal policy”) (citations omitted).

The majority rule that has emerged from federal case law is that a two-prong test should be applied to determine when the qualified privilege protecting income tax returns is overcome. Terwilliger v. York Int’l Corp., 176 F.R.D. 214, 216-17 (W.D. Va. 1997). Under this test, tax returns are discoverable if (1) they are relevant to a matter in dispute; and (2) they are needed, because the information is not available from other sources. Id. at 217. The burden to show that the tax returns are relevant lies with the party seeking disclosure, while the burden to identify an alternate source of the information lies with the resisting party. Id.

A.

Here, Interstate has met its burden under the first prong of the test. Under N.C. Gen. Stat. § 1D-35(2)(i), a “defendant’s ability to pay punitive damages, as evidenced by its revenues or net worth,” is relevant to the jury’s determination of the amount of punitive damages to award. Therefore, tax returns which provide information as to a defendant’s net worth are relevant if the defendant is potentially liable for punitive damages. See Blount v. Wake Elec. Membership Corp., 162 F.R.D. 102, 105 (E.D.N.C. 1993); Vanguard Military Equip. Corp., v. David B. Finestone Co., 6 F. Supp. 2d 488, 495-496 (E.D. Va. 1997). In Blount, the court held that the defendant’s tax returns would become relevant and discoverable if and when plaintiff’s punitive damages claims survived either a

motion to dismiss or motion for summary judgment. 162 F.R.D. at 105.

Here, a factual basis has been provided for Interstate's punitive damages claims against Mr. Fisher. These claims survived Defendants' Motion for Summary Judgment, and therefore, the financial information contained within Mr. Fisher's tax returns is relevant. Thus, Interstate has met its burden of showing that the returns are relevant to a matter in dispute, namely the punitive damages claims.

B.

While Interstate has met its burden to show that the tax returns are relevant, Defendant Fisher cannot meet his burden under the second prong to show that the information in his returns is already available to Interstate. Mr. Fisher argues that the only relevant information in the returns has already been provided to Interstate, either through the corporate tax returns of Century, or through a personal Financial Statement prepared by Mr. Fisher. Each source of information is discussed below.

In response to Interstate's Renewed Motion to Compel, Mr. Fisher filed an Affidavit [Doc. #116] in which he states that he and his wife file joint returns, and that the only income reflected on the returns attributable to him is income from Century, Inc. Century's corporate tax returns for the years 1998 through 2001 have been provided to Interstate, and show the amount paid to Mr. Fisher during those years. In the Affidavit, Mr. Fisher further states that he has no other source of income; therefore, the information in his personal tax returns is already available to Interstate through reference to Century's corporate tax returns.

In addition, Mr. Fisher created and provided to Interstate a Confidential Financial Statement dated December 19, 2002. Mr. Fisher contends that this statement contains full information regarding his net worth.

In response, Interstate contends that Mr. Fisher's tax returns would provide significant information as to Mr. Fisher's income and net worth that is not available in either the provided corporate tax returns or the Financial Statement. First, Interstate contends that the statement in Mr. Fisher's Affidavit that he has no income other than salary from Century, Inc. is contradicted by information provided in his own Financial Statement. The Statement lists source of income to include salary, bonuses and commissions, and "other income." Further, the Statement indicates that Mr. Fisher has substantial amounts invested in capital markets. Mr. Fisher's tax returns would indicate gains, losses, and any income paid from these investments, relevant information that is not reflected in the corporate tax returns or the Financial Statement.

Second, Interstate points out that Century's most recent tax returns have not been provided (returns for the years 1998 through 2001 were provided). Similarly, the Financial Statement is dated December 19, 2002, and therefore does not reflect any information beyond that date. Therefore, even the limited information provided by the corporate returns and the Financial Statement is not available for the last year.

Finally, Interstate questions the reliability and accuracy of the Financial Statement. The Statement is unverified, "lacking in meaningful detail," and, as discussed above, contradicted by statements in Mr. Fisher's Affidavit.¹

Given the incomplete, and in some cases unverified, nature of the financial information already provided to Interstate, this Court holds that Mr. Fisher has not carried his burden of showing that the financial information contained in his income tax returns is otherwise available to Interstate. Therefore, the two-prong test discussed above has been met. Any qualified privilege protecting Mr. Fisher's tax returns has been overcome, and the returns are therefore discoverable.²

¹Interstate's concern over the accuracy of Mr. Fisher's Financial Statement should be considered in the context of the procedural history of this case. Interstate's pending Motion for Appropriate Relief [Doc. #68] rests on alleged misrepresentations made by Century and the individual Defendants throughout this litigation.

²Mr. Fisher's privacy argument is noted, but does not change the discoverability of the tax returns in question. In opposing Interstate's Motion to Compel, Mr. Fisher contends that disclosure of his joint income tax returns would violate his wife's privacy interests. The tax returns include some information pertaining only to Mrs. Fisher, and therefore irrelevant to the disputes at hand.

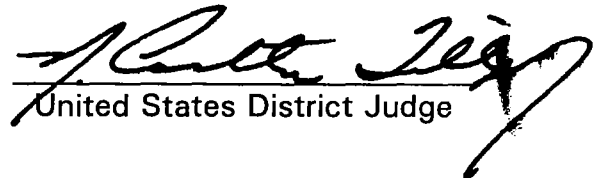
Mr. Fisher's concerns can be addressed in two ways: (1) Interstate has already agreed to a redaction of personal information such as date of birth and Social Security numbers; and (2) a Protective Order has been in place in this case since June 3, 2002 [Doc. #14] and would cover the provided tax returns.

A Protective Order is sufficient to protect Mrs. Fisher's privacy interests. See, e.g., In re Greenwood Air Crash, 161 F.R.D. 387, 393 (S.D. Ind. 1995) ("the fact that she filed jointly with Mr. McKinney, whose tax filings are relevant, does not prevent discovery of the joint returns"); Sakaguchi v. Legacy Health Sys., 1998 WL 709788 *2 (D. Or. 1998) (rejecting argument that husband's privacy would be invaded by production of joint returns, because parties' stipulated protective order provided adequate safeguards for such information).

III.

In summary, Interstate's Motion to Compel Production of Mr. Fisher's income tax returns will be GRANTED. IT IS ORDERED that Mr. Fisher produce, within 20 days, his state and federal tax returns from 1998 through the present, including any schedules or attachments. Mr. Fisher may elect to redact personal and non-financial information, such as his and his wife's date of birth and Social Security numbers. However, no financial information may be redacted. To protect the Fishers' privacy interests, the terms of the June 3, 2002 Protective Order will apply to all provided documents.

This 24th day of February, 2004


United States District Judge